RICHARD V. VERMAZEN (State Bar #153029) Law Office of Richard V. Vermazen 2 1951 Cable Street San Diego, CA 92107 3 Telephone: (619) 523-8495 Fax: (619) 523-8575 4 LAUREN A. RINSKY (State Bar #240012) 5 Ernest S. Ryder & Associates, Inc., APLC 11440 West Bernardo Court, Suite 170 6 San Diego, CA 92127 Telephone: (858) 674-8000 7 Fax (858) 674-0788 8 Attorneys for Plaintiffs 9 10 11 UNITED STATES DISTRICT COURT 12 SOUTHERN DISTRICT OF CALIFORNIA 13 14 RICHARD D. EMMERSON Civil No. 08 CV 1439 W WMc AND M. HELEN EMMERSON, 15 PLAINTIFFS' EX PARTE APPLICATION TO FILE FIRST AMENDED COMPLAINT Plaintiffs, 16 WITH CONFIDENTIAL INFORMATION REDACTED AND TO PLACE ORIGINAL VS. 17 COMPLAINT UNDER SEAL UNITED STATES OF AMERICA, 18 Defendant. 19 20 21 Plaintiffs hereby apply to the Court ex parte for an order allowing Plaintiffs to file the 22 attached amended complaint with confidential information redacted (the "Amended Complaint") 23 and to place the Complaint filed on August 8, 2008 (the "Original Complaint") under Seal. 24 This application is based on General Order No. 514 as amended which requires counsel 25 or parties to remove or redact personal information, including Social Security Numbers, from all 26 pleadings (including exhibits) filed with the District Court. Here, the Original Complaint 27 includes exhibits containing the Social Security Numbers of Plaintiffs as well as the Social 28 Security Numbers of other individuals. The language of the First Amended Complaint

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PLAINTIFFS' EX PARTE APPLICATION TO FILE FIRST AMENDED COMPLAINT AND TO PLACE ORIGINAL COMPLAINT UNDER SEAL

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(including exhibits) has the same language as the Original Complaint (including exhibits) except that the Social Security Numbers in the exhibits attached to the First Amended Complaint have been redacted and replaced with the following language: [REDACTED]. Granting Plaintiffs' request to file an Amended Complaint and to place the Original Complaint under Seal is necessary to comply with General Order No. 514 as amended, the policy on privacy and public access to electronic case files of the Judicial Conference of the United States, and the E-Government Act of 2002.

This application is further based on the memorandum of points and authorities and the declaration filed with this application.

Plaintiffs respectfully request that the Court allow Plaintiffs to file an Amended Complaint with confidential information redacted and to place the Original Complaint under Seal.

Dated: August 19, 2008

By: s/ Richard V. Vermazen
Richard V. Vermazen,
Attorney for Plaintiffs

By: s/ Lauren A. Rinsky
Lauren A. Rinsky,
Attorney for Plaintiffs

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1 RICHARD V. VERMAZEN (State Bar #153029) Law Office of Richard V. Vermazen 2 1951 Cable Street San Diego, CA 92107 3 Telephone: (619) 523-8495 Fax: (619) 523-8575 4 LAUREN A. RINSKY (State Bar #240012) 5 Ernest S. Ryder & Associates, Inc., APLC 11440 West Bernardo Court, Suite 170 6 San Diego, CA 92127 Telephone: (858) 674-8000 7 Fax (858) 674-0788 8 Attorneys for Plaintiffs 9 10 11 UNITED STATES DISTRICT COURT 12 SOUTHERN DISTRICT OF CALIFORNIA 13 14 RICHARD D. EMMERSON Civil No. 08 CV 1439 W WMc AND M. HELEN EMMERSON, 15 [PROPOSED] FIRST AMENDED COMPLAINT FOR REFUND Plaintiffs, 16 ANDABATEMENT OF TAX vs. 17 DEMAND FOR JURY TRIAL UNITED STATES OF AMERICA, 18 Defendant. 19 20 21 **COMPLAINT** 22 Richard D. Emmerson and M. Helen Emmerson, as Plaintiffs (the "Plaintiffs"), by and 23 through their attorneys, Richard V. Vermazen and Lauren A. Rinsky, hereby allege against 24 United States of America as Defendant (the "Defendant"), as follows: 25 **Nature of Complaint** 26 1. This is a civil cause of action against the United States of America and is based upon 27 26 U.S.C.A. § 7422(a) which provides for actions by taxpayers for the recovery of any internal 28 revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected.

Jurisdiction

2. The District Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1340, 1346(a)(1), which provides that the District Court has shall have original jurisdiction of any civil action arising under any act of Congress providing for internal revenue and for the recovery of any internal revenue tax alleged to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected under the Internal Revenue laws.

Venue

3. Plaintiffs, Richard D. Emmerson and M. Helen Emmerson, are citizens of the United States and reside at 4612 Rancho Reposo, Del Mar, California 92014, and therefore venue is proper in the Southern District of California.

Procedural Facts

4. The full amount of the tax, penalties, and interest in question was paid by the Plaintiffs to the District Director of Internal Revenue at Fresno, California prior to filing a refund claim. The amounts of the penalties for the 1999 tax year plus interest paid by the Plaintiffs which are demanded to be refunded to the Plaintiffs are as follows:

Penalty/Interest	Tax Year	Payment Amount
26 U.S.C. §6651(a)(1)	1999	\$42,003.63
26 U.S.C. §6651(a)(2)	1999	\$14,001.21
Interest Charged	1999	\$129,609.14
Interest on Overpayment	1999	\$3,445.66
	TOTAL	\$189.059.64

Additional taxes and penalties for the 1999 tax year have been assessed were paid in full by

Plaintiffs; however only penalties and interest in the amount of \$189,059.64 are subject to the

5. Subsequent to the payments set out above in paragraph 12, no further payments,

and Request for Abatement together with documentation in support of the Plaintiffs' position,

attached hereto as Exhibit A and incorporated by reference, with the Internal Revenue Service

6. On September 27, 2005, the Plaintiffs filed a timely IRS Form 843, Claim for Refund

7. On or about August 15, 2006, the Internal Revenue Service issued a letter (IRS Form

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LTR 854C) denying the Plaintiffs' claim for refund (see Exhibit B).

Relevant Facts

8. During the year at issue, the Plaintiffs employed an accountant, Bill Boettger, CPA, to prepare and file their 1999 tax return.

9. Without extensions, the Plaintiffs 1999 tax return would have been due April 15, 2000.

for the penalties and interest paid by the Plaintiffs for the 1999 tax year.

refunds or credits of tax, or interest for the tax period at issue have been made.

abatement and refund demand of Plaintiffs.

15, 2000 to October 16, 2000, as October 15, 2000 was a Sunday.

11. The Plaintiffs adamantly believe that their CPA tax preparer filed a second extension, IRS Form 2688, Application for Additional Extension of Time To File U.S. Individual Income Tax Return, in a timely fashion for the Plaintiffs, requesting an extension of time until October 15, 2000, for the Plaintiffs' to file their 1999 tax return.

10. It is not disputed that the Plaintiffs timely filed an extension with the Internal

Revenue Service to extend the due date for their 1999 tax return to August 15, 2000. Further it is

not disputed that the tax return was filed on or before October 16, 2000. The essence of the

dispute is whether the Plaintiffs filed a "second extension" to extend the due date from August

- 12. Pursuant to the second extension, the Plaintiffs filed their Form 1040 for the 1999 tax year on or before the extended due date of October 16, 2000.
- 13. Although the Plaintiffs have provided the Internal Revenue Service with various documents and testimony to prove that the second extension request was prepared and timely

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filed, it is the position of the Internal Revenue Service that a second extension was not timely filed because the Plaintiffs have not been able to provide the Internal Revenue Service with a copy of an approved second extension from the Internal Revenue Service.

- 14. The Plaintiffs entered into the Internal Revenue Service's Announcement 2004-46 Settlement Initiative Program ("Settlement Initiative Program") for the 1999 tax year. Upon completion of the settlement, the Plaintiffs were assessed additional tax of \$628,329.00, as well as a 10% 26 U.S.C. §6662(a) penalty in the amount of \$62,833.00, a 26 U.S.C. §6651(a)(1) late filing penalty in the amount of \$42,003.63, a 26 U.S.C. §6651(a) (2) late-payment penalty in the amount of \$14,001.21.21, and interest calculated continuously from April 15, 2000 through the date of the settlement.
- 15. The Plaintiffs entered into the Settlement Initiative Program with the understanding that no penalties other than the 10% 26 U.S.C. §6662(a) penalty would be assessed. There was no mention of a late-payment penalty assessment.

Improper Actions By Defendant United States of America

- 16. The assessment of a 26 U.S.C. §6651(a)(1) late-filing penalty and a 26 U.S.C. §6651(a)(2) late-payment penalty against Richard D. Emmerson and M. Helen Emmerson for the 1999 tax year was improper since a timely extension was filed with the Internal Revenue Service to extend the due date of their 1999 individual tax return from August 15, 2000 to October 16, 2000, and their 1999 individual tax return was filed on or before October 16, 2000. Therefore, the Plaintiffs are entitled to abatement and refund of the \$189,059.64 penalties and interest paid for the 1999 tax year, which amount includes interest due to the Plaintiffs of \$3,445.66 on the overpayments made, calculated through September 15, 2005.
- 17. The assessment of a 26 U.S.C. §6651(a)(1) late-filing penalty and a 26 U.S.C. §6651(a)(2) late-payment penalty against Richard D. Emmerson and M. Helen Emmerson for the 1999 tax year was improper even if the Court concludes based upon the evidence that a valid second extension was not filed because Richard D. Emmerson and M. Helen Emmerson exercised reasonable and prudent oversight in the hiring and employment of their tax preparer, so that a failure to file a valid second extension would be excusable under a reasonable cause

standard. Therefore, the Plaintiffs are entitled to abatement and refund of the \$189,059.64 penalties and interest paid for the 1999 tax year, which amount includes interest due to the Plaintiffs of \$3,445.66 on the overpayments made, calculated through September 15, 2005.

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18. The assessment of the 26 U.S.C. §6651(a)(1) late-filing penalty against Richard D. Emmerson and M. Helen Emmerson and corresponding interest calculated continuously from April 15, 2000 was improper since Richard D. Emmerson and M. Helen Emmerson timely filed an extension with the Internal Revenue Service to extend the due date for their 1999 tax return until August 15, 2000. Thus, even if the Court concludes based on the evidence that a second extension was not filed, Richard D. Emmerson's and M. Helen Emmerson's 1999 tax return would not have been "late" until after August 15, 2000. Therefore, the Plaintiffs are entitled to abatement and refund of amounts paid attributable to the 26 U.S.C. §6651(a)(1) late-filing penalty for the 1999 tax year.

19. The assessment of the 26 U.S.C. §6651(a)(2) late-payment penalty against Richard D. Emmerson and M. Helen Emmerson and corresponding interest calculated continuously from April 15, 2000 was improper since Richard D. Emmerson and M. Helen Emmerson timely filed an extension with the Internal Revenue Service to extend the due date for their 1999 tax return until August 15, 2000. Thus, even if the Court concludes based on the evidence that a second extension was not filed, Richard D. Emmerson's and M. Helen Emmerson's 1999 tax return would not have been "late" until after August 15, 2000. Therefore, the Plaintiffs are entitled to abatement and refund of amounts paid attributable to the 26 U.S.C. §6651(a)(2) late-payment penalty for the 1999 tax year.

20. The Plaintiffs have incurred and continue to incur attorneys' fees in this action.

WHEREFORE, the Plaintiff respectfully requests the following relief:

A. Judgment for Plaintiff and against the Defendant, United States of America, upon the facts and law in the total amount of \$189,059.64, or such greater amount as may be legally payable, with interest thereon as provided by law;

B. Reimbursement by Defendant to Plaintiff of all of their attorneys' fees and costs in this action pursuant to 28 U.S.C. §2412(b) and 26 U.S.C. §7430;

C. Such other relief as this Court deems just and appropriate. Dated: August 19, 2008 By: s/ Richard V. Vermazen Richard V. Vermazen, Attorney for Plaintiffs By: s/ Lauren A. Rinsky Lauren A. Rinsky, Attorney for Plaintiffs

List of Exhibits

3	<u>Exibit</u>	Page Numbers	Type of Document
4	A	8 to 62	Claim for Refund and Request for Abatement (IRS Form 843
5			together with documentation in support of Plaintiffs' position) for tax period ending December 31, 1999

B 63 to 64 IRS denial of Claim for Refund (IRS Form LTR 854C, dated August 14, 2006) for tax period ending December 31, 1999.

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Department of the Treasury Internal Revenue Service

Claim for Refund and Request for Abatement

OMB No. 1545-0024

▶ See separate instructions.

Use Form 843 only if your claim involves (a) one of the taxes shown on line 3a or (b) a refund or abateme	ent of interest,	penalties,
or additions to tax on line 4a.		

Do not use Form 843 if your claim is for-

- An overpayment of income taxes;
- A refund for nontaxable use (or sales) of fuel; or

•	An overpayment of excise taxes reported on Formis) 11-C, 720, 730, or 2290.	
Ē	Name of claimant RICHARD D. EMMERSON & M. HELEN EMMERSON	Your SSN or ITIN REDACTED
Type or print	Address (number, street, and room or suite no.) 4612 RANCHO REPOSO	Spouse's SSN or ITIN [REDACTED]
Ĭ,	City or town, state, and ZIP code DEL MAR, CA 92014	Employer identification number (EIN)
	Name and address shown on return if different from above	Daytime telephone number
	SAME	(858) 945-5728
1	Period. Prepare a separate Form 843 for each tax period From 01 / 01 / 1999 to 12 / 31 / 1999	2 Amount to be refunded or abated \$ 189,059.64
	a Type of tax, penalty, or addition to tax: ☐ Employment ☐ Estate ☐ Gift ☐ Excise (see instructions) ☐ Penalty—IRC section ▶ 6551(a)(1) & (2) b Type of return filed (see instructions): ☐ 706 ☐ 709 ☐ 940 ☐ 941 ☐ 943 ☐ 945 ☐ 990-PF ☐ 4	720 🗹 Other (specify) 1040
	Request for abatement or refund of: Interest as a result of IRS errors or delays. A penalty or addition to tax as a result of erroneous advice from the IRS. b Dates of payment	
Ļ	Evaluation and additional plains. Evaluit why you believe this claim should be alle	word and show computation of the

refund or abatement of interest, penalty, or addition to tax. If you need more space, attach additional sheets.

SEE ATTACHED STATEMENT FOR EXPLANATION AND CALCULATION OF AMOUNT TO BE ABATED.



Signature. If you are filing Form 843 to request a refund or abatement relating to a joint return, both	you and your spouse must
sign the claim. Claims filed by corporations must be signed by a corporate officer authorized to sign,	and the signature must be
accompanied by the officer's title.	
Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and, to the	e best of my knowledge and
belief, it is true, correct, and complete.	
belief, it is true, correct, and complete.	0 0 0

Signature (Title, if applicable, Claims by corporations must be signed by an officer.)

Date

Form 843 (Rev. 11-2002)

Richard D. & M. Helen Emmerson

[REDACTED]

FORM 843 - LINE 5

The taxpayers entered into the Internal Revenue Service's Announcement 2004-46 Settlement Initiative Program for the 1999 tax year. Upon completion of the settlement, the taxpayers were assessed additional tax of \$628,329, a 10 percent IRC Section 6662(a) penalty of \$62,833, a Section 6651(a)(1) late-filing penalty of \$42,003.63, a Section 6651(a)(2) late-payment penalty of \$14,001.21, and interest calculated continuously from April 15, 2000 through the date of the settlement.

The taxpayers agreed with the Service's assessment of the additional tax and the 10% Section 6662(a) penalty, pursuant to the Settlement Initiative program. The taxpayers, however, do not agree with the assessment of the Section 6651(a)(1) and Section 6651(a)(2) penalties. In addition, the taxpayers believe that IRC Section 6404(g) should be in effect for the calculation of interest on the assessment. Section 6404(g) would suspend the calculation of interest after 18 months from the time the return was filed.

The taxpayers' Form 1040 for the 1999 tax year was filed by the second extended due date, October 16, 2000. It is the Service's position that no Form 2688, Application for Additional Extension of Time to File U.S. Individual Income Tax Return, was timely filed by the taxpayer. We provided the Revenue Agent with various documents to prove that the second extension request was prepared and filed and that the late-filing and late-payment penalties should be abated. The Revenue Agent rejected our documentary evidence since we did not have a copy of an approved extension and proceeded with the assessment.

Attached are the various documents we provided to the Agent as evidence of the filing of the second extension. Unfortunately, an approved extension was not received from the Internal Revenue Service. It appears that the Service itself also does not have a copy of the extension. However, based on the evidence provided, it is clear that a second extension request was prepared and mailed (timely mailing is considered timely filing).

Additionally, the taxpayers entered into the Service's Settlement Initiative program with the understanding that no penalties other than the 10% Section 6662(a) penalty would be assessed. There was no mention of a late-payment penalty assessment. The assessment of a late-payment penalty is counter to the purpose of the Service's Settlement Initiative, which was to quickly and easily resolve tax disputes related to certain transactions that the Service considered abusive.

Attached is the calculation for the abatement of the late-filing and late-payment penalty and for the abatement of the additional interest that was assessed

Richard D. & M. Helen Emmerson

[REDACTED]

because the Service did not suspend the running of interest under Section 6404(g).

Based on the above and the calculation attached, the taxpayers are requesting abatement of \$189,059.64 of penalties and interest paid for the 1999 tax year. This includes interest due to the taxpayer of \$3,445.66 on the overpayments made, calculated through September 15, 2005.

Richard D. & M. Helen Emmerson

[REDACTED]

SCHEDULE OF ATTACHMENTS TO FORM 843

- 1. Calculation of abatement amount.
- 2. Copy of Form 2688 for Richard D. and M. Helen Emmerson for the 1999 tax year.
- 3. Letter dated November 18, 2004 to David Catalini of the Internal Revenue Service from Bill Boettger.
- 4. Letter dated January 27, 2005 to David Catalini and Joseph Kennedy of the Internal Revenue Service from Ernest S. Ryder.
- 5. Declaration of William C. Boettger.
- 6. Declaration of Kimberly M. Swelgin.
- 7. Tax Dockets prepared by Harlan & Boettger, LLP for Robert B. Clark, James L. Kelley, Robert M. Tague, and Richard & Helen Emmerson.
- 8. Tax Return Transmittal/Instruction Sheets prepared by Harlan & Boettger, LLP for Robert B. Clark, James L. Kelley, Robert M. Tague, and Richard & Helen Emmerson.
- 9. Approved Form 2688 Extensions prepared by Harlan & Boettger, LLP for Robert B. Clark, James L. Kelley, and Robert M. Tague.
- 10. Billing Worksheets/Timesheets from Harlan & Boettger, LLP for Robert B. Clark, James L. Kelley, Robert M. Tague, and Richard & Helen Emmerson.
- 11. Form 2848, Power of Attorney and Declaration of Representative.

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Richard D. & M. Helen Emmerson

[REDACTED]

Form 843 Year 1999 Calculation of abatement amount

Per IRS	Per 843	<u>Difference</u>
628,329.00	628,329.00	
62,833.00	62,833.00	
42,003.63	-	(42,003.63)
14,001.21	-	(14,001.21)
264,930.85	135,321.71	(129,609.14)
<u>. </u>	(3,445.66)	(3,445.66)
1,012,097.69	823,038.05	(189,059.64)
	628,329.00 62,833.00 42,003.63 14,001.21 264,930.85	628,329.00 628,329.00 62,833.00 62,833.00 42,003.63 - 14,001.21 - 264,930.85 135,321.71 t - (3,445.66)

See the attached schedule for the calculation of interest for the Form 843 Column.

Taxpayer name...: Emmersor. 843 calculation

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Taxpayer ID#...: [REDACTED]

Events	Date	Amount	Event Date Balance (1)
Additional tax Sec 6662(a) Sec 6404(g) 2004 Jobs Act Payment Payment Payment	04-15-00 10-15-00 04-15-02 10-04-04 03-30-05 04-22-05 07-15-05	628,329.00 62,833.00 <826,596.91> <109,815.14> <75,685.64>	628,329.00 720,079.00 806,713.20 806,713.20 <113.20> <109,928.77> <187,142.73>
Interest Computation Date	09-15-05		<189,059.64>

⁽¹⁾ Balance includes any interest and penalties accrued as of the Event Date

Interest Detail

Incerest Decarr					
Event	Date	Rate	Base	Interest	Balance
Additional tax	04-15-00		628,329.00		628,329.00
Interest	06-30-00	9.00	628,329.00	11,851.48	640,180.48
Interest	09-30-00	9.00	640,180.48	14,646.01	654,826.49
Interest	12-31-00	9.00	654,826.49	14,981.08	669,807.57
Interest	03-31-01	9.00	669,807.57	15,028.51	684,836.08
Interest	06-30-01	8.00	684,836.08	13,794.80	698,630.88
Interest	09-30-01	7.00	698,630.88	12,434.71	711,065.59
Interest	12-31-01	7.00	711,065.59	12,656.03	723,721.62
Interest	03-31-02	6.00	723,721.62	10,785.82	734,507.44
Interest	04-15-02	6.00	734,507.44	1,813.20	736,320.64
Sec 6404(g)	04-15-02				
Interest	06-30-02	6.00	736,320.64		736,320.64
Interest	09-30-02	6.00	736,320.64		736,320.64
Interest	12-31-02	6.00	736,320.64		736,320.64
Interest	03-31-03	5.00	736,320.64		736,320.64
Interest	06 - 30-03	5.00	736,320.64		736,320.64
Interest	09-30-03	5.00	736,320.64		736,320.64
Interest	12-31-03	4.00	736,320.64		736,320.64
Interest	03-31-04	4.00	736,320.64	•	736,320.64
Interest	06-30-04.	5.00	736,320.64		736,320.64
Interest	09-30-04	4.00	736,320.64		736,320.64
Interest	10-04-04	5.00	736,320.64		736,320.64
2004 Jobs Act	10-04-04				
Interest	12-31-04	5.00	736,320.64	8,904.75	745,225.39
Interest	03-30-05	5.00	745,225.39	9,140.61	754,366.00
Payment	03-30-05		<754,479.20>		<113.20>
Interest	03-31-05	5.00	<113.20>		<113.22>
Interest	04-22-05	6.00	<113.22>		<113.63>
Payment	04-22-05		<109,815.14>		<109,928.77>
Interest	07-15-05	6.00			<111,457.09>
Payment	07-15-05	1 1	<75,685.64>		<187,142.73>

INTEREST AND FENALTY-01439-W-WHCRT Document 4-3 Filed 08/19/2008 t Page: 8 of 55005.1

Taxpayer name...: Emmersor 843 calculation

Taxpayer ID#...: [REDACTED]

09-21-05

Page 2

Interest Detail

Event	Date	Rate	Base	Interest	Balance
Interest	09-15-05	6.00	<187,142.73>	<1,916.91>	<189,059.64>

Interest on Penalties

Incerest on Penar	CTCP				
Event	Date	Rate	Base	Interest	Balance
Sec 6662(a)	10-15-00		62,833.00		62,833.00
Interest	12-31-00	9.00	62,833.00	1,200.89	64,033.89
Interest	03-31-01	9.00	64,033.89	1,436.73	65,470.62
Interest	06-30-01	8.00	65,470.62	1,318.79	66,789.41
Interest	09-30-01	7.00	66,789.41	1,188.76	67,978.17
Interest	12-31-01	7.00	67,978.17	1,209.92	69,188.09
Interest	03-31-02	6.00	69,188.09	1,031.13	70,219.22
Interest	04-15-02	6.00	70,219.22	173.34	70,392.56
Sec 6404(g)	04-15-02				
Interest	06-30-02	6.00	70,392.56		70,392.56
Interest	09-30-02	6.00	70,392.56		70,392.56
Interest	12-31-02	6.00	70,392.56		70,392.56
Interest	03-31-03	5.00	70,392.56		70,392.56
Interest	06-30-03	5.00	70,392.56		70,392.56
Interest	09-30-03	5.00	70,392.56		70,392.56
Interest	12-31-03	4.00	70,392.56		70,392.56
Interest	03-31-04	4.00	70,392.56		70,392.56
Interest	06-30-04	5.00	70,392.56		70,392.56
Interest	09-30-04	4.00	70,392.56		70,392.56
Interest	10-04-04	5.00	70,392.56		70,392.56
2004 Jobs Act	10-04-04				•
Interest	12-31-04	5.00	70,392.56	851.30	71,243.86
Interest	03-30-05	5.00	71,243.86	873.85	72,117.71
Payment	03-30-05		<72,117.71>		0.00
Interest	03-31-05	5.00	,		0.00
Interest	09-15-05	6.00			0.00

Case 3:08 INTEREST AND PENAL	G-CV-01439-W-WMC	Document 4-3 Fi	iled 08/19/2008 Taxinterest V	Page 9 of 55 2005.1
Taxpayer name:	Emmersor 843 ca	lculation		09-21-05
Taxpayer ID#:				Page 3
	Summa	xy as of 09-15-	-05	
	Amount	Payments	Deposits	Balance
Tax	628,329.00	<813,942.98>	0.00	<185,613.98>
Interest	126,037.00	<126,037.00>	0.00	0.00
Refund interest	<3,445.66>	0.00	0.00	<3,445.66>
Penalty interest	9,284.71	<9,284.71>	0.00	0.00
Entered penalties	62,833.00	<62,833.00>	0.00	0.00
Totals	823,038.05	<1,012,097.69>	0.00	<189,059.64>

Prepared using: FEDERAL Table end date: 06-30-05

IRS interest rates

USER Table

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Form **2688**

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Application of Additional Extension of Tirr To File U.S. Individual Income Tax Return

See instructions on back.

Department	ίo	the	Treasury

rtment or the Treasury nat Revenue Service	<u></u> ► Yo	ou MUST complete all items that apply to you	Your social security number
se Your first na	me and initial	Last name	
RICHA	RD D	EMMERSON	[REDACTED]
If a joint retu	ırn, spouse's first name and initial	Last name	[REDACTED]
M. HE		EMMERSON	[KLDAO125]
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	or post office, state, and ZIP code		
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SENT VIA FAX - (781) 835-4001

November 18, 2004

To: David Catalini

Internal Revenue Agent

Re: Richard and Helen Emmerson

Tax Year: 1999

Dear David:

Got your voice message that you left yesterday and I am a little surprised. You sent us your portion of the papers relating to the Emmersons on November 1, 2004 and I thought we had till November 30, 2004 to get the signed papers back to you.

I realize that the issue that I am questioning is the assertion of the late filing penalty and I told you that we were attempting to find the Emmerson's 1999 file. The firm is in the process of moving and the 1999 file was temporarily misplaced. I also believe Dave Gibbs has relayed this same message to you.

Regardless, we have found the missing file and I am happy to report that a second extension application was filed on August 15, 2000 for the Emmersons. As a matter of fact I was the one who signed the application as per the copy of our tax docket that I am enclosing. Further, I am enclosing a copy of the instruction sheet that was sent to the client when we sent them their 1999 tax returns which shows the due date of the return to be October 16, 2000. Had no second extension been requested, the instructions would have noted to file the return as soon as possible. The file does not contain a copy of the extension request since the approved extension would have been attached to the filed return.

Our firm's policy for the preparation of tax returns, extensions, etc. was as follows:

A preparer would be assigned to prepare the item,

A reviewer would be assigned to review the item,

The completed item would be given to the partner for the final review and signature,

And the item would be sent to the client for their signature and filing.

In the case of extensions without any tax due, we (the firm) would prepare, sign and file the extension request from our office. If the extension were due within five days of when prepared, a person would be sent to the post office and deposit the envelope in the mail.

Page 2, David Catalini, IRS Agent

The firm's procedures for preparing and filing the Emmerson's second extension were followed based on the docket. The docket indicates that the extension application was prepared, reviewed and signed and sent to the IRS. I was the person who signed the extension application on August 15 and sent it directly to the IRS. The envelope with the extension would have been deposited in the mail at the main post office. (I can't say I took this envelope to the Post Office on August 15, 2000 but I did take the mail to the Post Office on many April 15, June 15, August 15, Sept. 15 and Oct 15 – so I could have taken this envelope to the Post Office.)

Hopefully this is sufficient to cover this issue. If it is not, please tell me what additional information you need in order to eliminate the assertion of this penalty.

Sorry that we have not been able to talk this past week or so as my schedule for the last few weeks has been hectic. I will be out of the office tomorrow (Nov 19) morning till 8:30 or 9:00 – client meeting - and then be gone to another client meeting around 11:00 AM back in the late afternoon. If you call and I am not here, please leave a message and we will talk on Monday, Nov 22.

Thanks, Bill Boettger

Case 3:08-cv-01439-W-WMC Document 4-3

Filed 08/19/2008 Page 15 of 55

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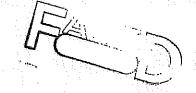
ERNEST S. RYDER & ASSOCIATES, INC.

A PROFESSIONAL LAW CORPORATION

11440 West Bernardo Court, Suite 170 San Diego, California 92127

TELEPHONE (858) 674-8000 FAX (858) 674-0788

January 27, 2005



Via Facsimile (781) 835-4001& US Mail

Mr. David Catalini Mr. Joseph Kennedy INTERNAL REVENUE SERVICE One Montvale Avenue, Group 1745 Stoneham, MA 02180-3565

Re: Richard & Helen Emmerson

1999 Tax Year

Dear Mr. Catalini and Mr. Kennedy,

We are writing to demonstrate that the accounting firm of Harlan & Boettger timely filed an IRS Form 2688 for Richard and Helen Emmerson on August 15, 2000. Based upon our prior discussions, you have asked us to provide some evidence that an extension was in fact prepared, processed and timely filed.

Since a copy of the Emmerson's approved extension is not available, we asked Mr. Boettger to review his files for other clients for whom the firm filed extensions on or about August 15, 2000, so that we could demonstrate a course of conduct which should convince you that the extension was in fact prepared, processed and timely filed. In this regard, Mr. Boettger provided us with documentation for the following three clients other than the Emmersons:

- 1. Robert B. Clark
- 2. James L. Kelley
- 3. Robert M. Tague

Mr. David Catalini Mr. Joseph Kennedy Internal Revenue Service January 27, 2005 Page 2

Enclosed herewith please find copies of approved IRS Forms 2688 for these other three clients of the accounting firm.

With these copies in hand, you know in fact that these extensions were prepared, processed and timely filed with the IRS, since the IRS approved each extension and returned them to either the firm or the taxpayer. By providing you with copies of these extensions and the other materials described below, we can demonstrate a course of conduct that should convince you that an extension was in fact prepared, processed and timely filed for the Emmersons. As you can see, each of these extensions was signed by Mr. Boettger on either August 14, 2000 or August 15, 2000.

As we understand, when the accounting firm prepares a tax form, it starts with a document referred to internally as a "Tax Docket". The Tax Docket is a document included in each client's file to track the work in progress for each tax form which is prepared and processed by the firm. Generally, each person who works on the project indicates his or her involvement, the date of that involvement and an identification of the task performed (in this case, the preparation of the IRS Form 2688, the second request for an extension of time to file the return). Each Tax Docket is dated and signed contemporaneously with the completion of the task performed.

For each of the three other clients identified above, enclosed herewith please find a copy of the relevant Tax Docket which in each case was signed contemporaneously by Mr. Boettger at the time he signed the extension, and which further indicates that the extension was sent to the IRS. In each case, you know in fact that the Tax Docket is true and correct since you have in hand a copy of the relevant approved extension to which the Tax Docket relates. Similarly, enclosed herewith is the Tax Docket for the

Mr. David Catalini Mr. Joseph Kennedv Internal Revenue Service January 27, 2005 Page 3

Emmersons which is dated and signed by Mr. Boettger, and indicates that the extension was sent to the IRS on August 15, 2000.

In addition, for each of the three other clients identified above, enclosed please find a copy of the Billing Worksheet/Timesheet which indicates that an extension was prepared by a member of the firm. Again, you know in fact that the Billing Worksheet/Timesheet is true and correct since you have in hand a copy of the approved extension for each client. Similarly, enclosed herewith is a Billing Worksheet/Timesheet for the Emmersons which also indicates that the extension was prepared and processed on August 15, 2000.

Please note that the dates on each approved extension, and the relevant Tax Docket and Billing Worksheet/Timesheet all correspond and are consistent for each client as performed on either August 14, 2000 or August 15, 2000. Similarly, the dates for the Emmersons on their Tax Docket and their Billing Worksheet/Timesheet correspond and are consistent with the task being performed on August 15, 2000.

As we have discussed, based upon our actual experience, it is not unusual for an extension request which is timely filed to not be returned by the IRS with an approval, so it was not considered unusual for an approved extension to not be returned to the Emmersons.

Further, consistent with an extension being filed for each of the three other clients identified above, enclosed please find the transmittal/filing instruction sheet that went to each client with the final IRS Form 1040 return as prepared by the firm. Please note that each instruction sheet states:

"File your signed return by October 15 [or October 16] ..."

Mr. David Catalini Mr. Joseph Kennedy Internal Revenue Service January 27, 2005 Page 4

This is the language that is included on the instruction sheet for each client of the firm when an extension has been filed, whether or not an approved extension is returned by the IRS. Mr. Boettger has advised us that when an extension has not been filed, the instruction sheet would state:

"File your signed return as soon as possible..."

In this regard, enclosed also please find the instruction sheet which accompanied the return for the Emmersons. You will note that the instruction sheet reads:

"File your signed return by October 16 ..."

Just like the three other client situations where you know the extensions were in fact filed since you have a copy of the approved extensions in hand, you should have the confidence that the accounting firm's course of conduct from the Tax Docket through the Billing Worksheet/Timesheet to the filing instruction sheet all show that similarly an extension was timely filed for the Emmersons.

Finally, enclosed herewith please find a declaration under penalty of perjury executed by Mr. Boettger to the effect that he did in fact sign an IRS Form 2688 and that the firm mailed the form to the IRS on August 15, 2000.

Accordingly, we believe that we have demonstrated by a preponderance of this documentary evidence, which includes concurrent and consistent, contemporaneous documentation, that the accounting firm of Harlan & Boettger prepared, processed and timely filed an IRS Form 2688 for the Emmersons. We believe by a preponderance of this documentary evidence that either the extension was not delivered by the

Mr. David Catalini Mr. Joseph Kennedy Internal Revenue Service January 27, 2005 Page 5

US Postal Service to the IRS, or that the IRS failed to process the extension and return it to the Emmersons. We trust you agree with this conclusion and will not impose any late filing penalty, as well as not accrue any interest beyond the Section 6404(g) time period.

In adopting the penalty provisions to the Internal Revenue Code, Congress was interested in imposing sanctions upon those who willfully disregard or neglect their filing and payment responsibilities and not those who through no fault of their own file their tax returns late. No social or national interest would be served in imposing a penalty in this situation. Accordingly, we feel that any late filing was due to reasonable cause and not to willful disregard or neglect, and that no penalty should be imposed, nor should any additional interest be accrued beyond the Section 6404(g) time period. We trust that you agree with our conclusions.

If you have any questions or comments, or need additional information, please do not hesitate to contact us.

With kindest regards,

ERNEST S. RYDER & ASSOCIATES, INC.

A Professional Law Cofforation

Ernest S. Ryder

Enclosures

cc: William C. Boettger, CPA

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DECLARATION UNDER PENALTY OF PERJURY FOR WILLIAM C. BOETTGER

Filed 08/19/2008

DECLARATION OF SIGNOR OF FORM 2688

To whom it may concern:

Under penalties of perjury, I, William C. Boettger, declare that on August 15, 2000 I reviewed, signed, inserted in an envelope addressed to the Internal Revenue Service, Freeno, CA 93888 and placed in the outgoing mail at the offices of Harlan & Boettger, LLP the form 2688, Application for Additional Extension of Time to File U.S. Individual Income Tex Return, for Richard and Helen Emmerson for the tax year 1999.

Further, I declare that on August 15, 2000 all mail that was addressed to the Internal Revenue Service was deposited at the Main Post Office located on Midway Drive in Sain Diego, CA at approximately 5:00 PM.

I declare that this statement is true, correct and complete.

William C. Boettger

January 19, 2005

Document 4-3 Filed 08/19/2008

Case 3:08-cv-01439-W-WMC Document 4-3

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DECLARATION KIMBERLY M. SWELGIN

The undersigned, KIMBERLY M. SWELGIN, hereby declares the following:

- 1. I was employed by the accounting firm of Harlan & Boettger from 1990 until March 2003. I started as a receptionist and in 1993 was promoted to the position of Administrative Assistant, responsible for processing tax returns; I was the only person in that position. During June 2000, I graduated from San Diego State University with a Bachelor of Arts Degree in Economics.
- 2. I specifically recall that at approximately 4:30 p.m. on August 15, 2000, William C. Boettger, CPA walked down the stairs of our two story office building to the mail station where I worked and exclaimed "Don't leave until I give you the Emmerson extension." I then went back to my desk in the mail station area and waited. Shortly thereafter, Mr. Boettger handed me the Emmerson extension in a sealed envelope. I immediately added a stamp to the envelope (I did not use a postage machine), and took the envelope along with an armful of other mail, including other extensions and tax returns, and drove in my Red Honda Civic to the main post office on Midway Drive in San Diego and deposited them all in the drive-thru mail box on or about 5:30 p.m.
- 3. I specifically recall these events because at that moment in time I was aware and consciously thinking that it would be the last extension and the last time I would have to work on a rush deadline for any tax season, since I was in the process of looking elsewhere for employment, and did not expect to continue working for Harlan & Boettger. My major was in Economics, not Accounting. Nevertheless, I did continue to work for Harlan & Boettger after my graduation and after August 15, 2000, but in

the audit department rather than the tax department. I never had to work a busy tax season again, consistent with my conscious and concurrent thoughts during August 15, 2000.

- 4. Before I left the offices of Harlan & Boettger to drive to the post office on August 15, 2000, I called my good friends Mikie and Kenra Meyer to let them know that I might be running late since we all planned on having dinner in order to celebrate Mikie's birthday, which was the next day August 16, 2000. After depositing the extension in the drive-thru mail box, I drove to Old Town, San Diego to have dinner at the El Fandango Restaurant. During dinner at the El Fandango Restaurant, we had specific discussions regarding my trip to the post office and the fact that it would be the last time I would have to do so for any busy tax season.
- 5. When Mr. Boettger mentioned the Emmerson extension, I knew personally who Mr. Emmerson was. While I was a receptionist, Mr. Emmerson would come into the office and I would recognize and greet him. I also knew who Mr. Emmerson was since Debbie Thompson, CPA, a former employee of Harlan & Boettger, went to work for Mr. Emmerson and his company. I knew Mr. Emmerson had a company known as Emmerson Enterprises, Inc. I knew Mr. Emmerson was one of the firm's most valued clients. In addition, I knew Mr. Emmerson lived in Del Mar since I delivered a document package to his house where Debbie Thompson, CPA was then working. I was very familiar with the name Emmerson.
- 6. I am willing to testify in Tax Court under oath to this effect, if necessary.

IN WITNESS HEREOF, I hereby declare under penalty and perjury that the foregoing is true and correct. Executed at San Diego, California this

2件上 day of May, 2005.

KIMBERLY M. SWELGIN

Page 33 Exhibit A

© 1997 National Notary Association • 5650 De Boic Ava., P.O. Bex 2402 - Chatsworth, CA 91313-2402 - www.nationoinciary.org

Reprose: Call Tol:-From 1-800-876-6827

Prod. No. 5514

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TAX DOCKETS

FOR

Robert B. Clark
James L. Kelley
Robert M. Tague
Richard & Helen Emmerson

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## TRANSMITTAL/INSTRUCTION SHEETS

FOR

Robert B. Clark James L. Kelley
Robert M. Tague
Richard & Helen Emmerson

ROBERT B. & CAROL M. CLARK
Instructions For Filing Form
1040
U.S. Individual Income Tax Return for 1999

Signature..

The original return should be signed (use full name) and dated on page 2 by the taxpayer and spouse.

Overpayment..

Your return shows a \$17,942. overpayment. Of this amount, \$7,442. will be refunded to you and \$10,500. has been applied to your 2000 estimated tax.

Filing..

File your signed return by October 16, 2000 with:

Internal Revenue Service Center Fresno, CA 93888-0102

JAMES L. KELLEY & ELIZABETH A. KELLEY
Instructions For Filing Form
1040

U.S. Individual Income Tax Return for 1999

### Signature..

The original return should be signed (use full name) and dated on page 2 by the taxpayer and spouse.

### Payment of Tax..

A check or money order payable to the "United States Treasury" in the amount of \$12,395. should be enclosed with the return and the 1040-V payment voucher. Your social security number and "1999 Form 1040" should be written on your check or money order.

The amount payable to the IRS includes:

Tax	
Penalty on underpayment of estimated tax	\$ 26.
Penalty for failure to pay 90% of the balance due	\$ 345.
Interest	\$ 526.
Total amount due to the IRS	\$ 12,395.
·	

### Filing..

File your signed return by October 16, 2000 with:

Internal Revenue Service Center P.O. Box 60000 Los Angeles, CA 90060-6000

ROBERT N. TAGUE
Instructions For Filing Form
1040
U.S. Individual Income Tax Return for 1999

Signature..

The original return should be signed (use full name) and dated on page 2 by the taxpayer.

Payment of Tax..

A check or money order payable to the "United States Treasury" in the amount of \$20,178. should be enclosed with the return and the 1040-V payment voucher. Your social security number and "1999 Form 1040" should be written on your check or money order.

The amount payable to the IRS includes:

Tax			17,993.
Penalty on underpay	ment of estimated tax .	\$	827.
Penalty for failure	to pay 90% of the bala	ance due \$	540.
			818.
	The state of the s		
Total amount due to	the IRS		20,178.

Filing..

File your signed return by October 15, 2000 with:

Internal Revenue Service Center P.O. Box 60000 Los Angeles, CA 90060-6000

RICHARD D. & M. HELEN EMMERSON
Instructions For Filing Form
1040
U.S. Individual Income Tax Return for 1999

Signature..

The original return should be signed (use full name) and dated on page 2 by the taxpayer and spouse.

Overpayment..

Your return shows a \$157,846. overpayment. Of this amount, \$157,846. will be refunded to you and NONE has been applied to your 2000 estimated tax.

Filing..

File your signed return by October 16, 2000 with

Internal Revenue Service Center Fresno, CA 93888-0102

## APPROVED EXTENSIONS

FOR

Robert B. Clark James L. Kelley Robert M. Tague

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# Application for Additional Extension of Time To File U.S. Individual Income Tax Return See instructions on back.

OMB No. 1545-0066

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if you e	expect to ha	ve to file a gift or generation-	skipping transfer (GST) tax return, com	rpiete line 4.	manufe b
			f tax return (Form 709 or 709-A) for 199		ırself
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For Privacy Act and Paperwork Reduction Act Notice, see back of form Page 49

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## BILLING WORKSHEET/TIMESHEETS

FOR

Robert B. Clark
James L. Kelley
Robert M. Tague
Richard & Helen Emmerson

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Case 3:08-cv-01439-W-WMC Document 4-3 Filed 08/19/2008 Page 50 of 55

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Oct-95-2085 02:26pm From-MURPHY PEARSON BRADLEY FEENEY

T-850 P.002/003 F-815

Form 28: (Rev. March 21: Coppartment of the Internal Revenue	р Тлеавигу	Power and Declaration  Type or print.		OMB No. 1545-0159 For IRS Use Only Received by: Name		
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Oct-05-2005 DZ:27pm

From-MURPHY PEARSON BRADLEY FEENEY

T-850 P.003/003 F-815

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Richard D. & M. Helen Emmerson		
4612 Rancho Reposo Del Mar, CA 92014-4201	[REDACTED]	
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Page 62 Exhibit A INS Department of the Treaspry
Internal Revenue Service
PO BOX 236
MEMPHIS TN 38101-0236



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In reply refer to: 0342120946 Aug. 14, 2006 LTR 105C EI [REDACTED] 199912 30 000 1

BODC: SB

RICHARD D & M HELEN EMMERSON % DAVID M GIBBS 5415 OBERLIN DR SAN DIEGD CA 92121-1716

CERTIFIED MAIL

Taxpayer Identification Number: [REDACTED]

Hand of Tax: 1040

Date of Claim(s) Received: Mar. 16, 2006

Tax Period : Dec. 31, 1999

### WE COULDN'T ALLOW YOUR CLAIM

Dear Richard & Helen Emmerson:

WHY WE'RE SENDING YOU THIS LETTER
This letter is your notice that we've disallowed your claim for credit for the period shown above.

WHY WE CANNOT ALLOW YOUR CLAIM We have enclosed Form 886-A, Explanations of Items, to explain the reason for disallowance of claim.

### IF YOU DISAGREE

You have the right to appeal our decision to disallow your claim. You may represent yourself before Appeals. You may have an attorney, certified public accountant, or person enrolled to practice before the Internal Revenue Service represent you. To have someone represent you, attach Form 2848, Power of Attorney and Declaration of Representative, (or similar written power of attorney) to your written statement.

You may request a small dollar case appeal for a disallowed claim that is less than \$25,000 or prepare a formal protest for a disallowed claim over \$25,000.

To request a small dollar case appeal for a claim, do the following:

- 1. State that you want to appeal.
- List the disallowed items you disagree with and why you don't agree with each item.
- Provide your name, address, taxpayer identification number, daytime telephone number, and a copy of this letter.
- 4. Mail your appeal request to the address shown on this letter.

0342120946 Aug. 14, 2006 LTR 105C El [REDACTED] 199912 30 000 1

RICHARD D & M HELEN EMMERSON % DAVID M GIBBS 5415 OBERLIN DR SAN DIEGO CA 92121-1716

Court having jurisdiction or with the United States Claims Court. These courts are part of the judiciary branch of the federal government and have no connection with the Internal Revenue Service.

The law permits you to do this within 2 years from the date of this letter. If you decide to appeal our decision first, the 2-year period still begins from the date of this letter. However, if you signed an agreement that waived your right to the notice of disallowance (Form 2297), the period for filing suit begins on the date you filed the waiver.

You may request an appeal, a hearing, or a meeting to disagree with any examination action. However, we will not allow an appeal in cases of failure or refusal to comply with tax laws because of moral, religious, political, constitutional, conscientious, or similar grounds.

HOW TO CONTACT US

If you have any questions, please call us toll free at 1-800-829-8374.

If you prefer, you may write to us at the address shown at the top of the first page of this letter.

Whenever you write, please include this letter and, in the spaces below, give us your telephone number with the hours we can reach you. Also, you may want to keep a copy of this letter for your records.

Telephone	Number	(	)	Hours
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RICHARD V. VERMAZEN (State Bar #153029) Law Office of Richard V. Vermazen 2 1951 Cable Street San Diego, CA 92107 3 Telephone: (619) 523-8495 Fax: (619) 523-8575 4 LAUREN A. RINSKY (State Bar #240012) 5 Ernest S. Ryder & Associates, Inc., APLC 11440 West Bernardo Court, Suite 170 6 San Diego, CA 92127 Telephone: (858) 674-8000 7 Fax (858) 674-0788 8 Attorneys for Plaintiffs 9 10 11 UNITED STATES DISTRICT COURT 12 SOUTHERN DISTRICT OF CALIFORNIA 13 14 RICHARD D. EMMERSON Civil No. 08 CV 1439 W WMc AND M. HELEN EMMERSON, 15 MEMORANDUM OF POINTS AND **AUTHORITIES IN SUPPORT OF** Plaintiffs, 16 PLAINTIFFS' EX PARTE APPLICATION TO FILE FIRST AMENDED COMPLAINT VS. 17 WITH CONFIDENTIAL INFORMATION REDACTED AND TO PLACE ORIGINAL UNITED STATES OF AMERICA 18 COMPLAINT UNDER SEAL Defendant. 19 20 21 I. INTRODUCTION. 22 The Judicial Conference of the United States has adopted a national policy on privacy 23 and public access to electronic case files. This policy was adopted by the United States District 24 Court Southern District of California in General Order No. 514. Plaintiffs seek an order 25 allowing Plaintiffs to file an amended complaint with confidential information redacted (the 26 "Amended Complaint") and to place the Complaint filed on August 8, 2008 (the "Original 27 Complaint") under Seal. Plaintiffs file this action to comply with General Order No. 514, the 28

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MEM. OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION TO FILE FIRST AMENDED COMPLAINT AND TO PLACE ORIGINAL COMPLAINT UNDER SEAL

MEM. OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION TO FILE FIRST AMENDED COMPLAINT AND TO

PLACE ORIGINAL COMPLAINT UNDER SEAL

policy on privacy and public access to electronic case files of the Judicial Conference of the United States, and the E-Government Act of 2002.

### II. ARGUMENT.

The Judicial Conference of the United States has adopted a national policy on privacy and public access to electronic case files. This policy was adopted by the United States District Court Southern District of California in General Order No. 514, which has since been amended by General Order No. 514-A, General Order No. 514-B, General Order No. 514-C, and General Order No. 514-D. The policy was adopted "to protect personal privacy of litigants appearing in the United States Courts" and "places the responsibility on counsel, the parties, or any other party preparing or filing a document not to include, or to redact, personal information from the document." *See* General Order No. 514-A.

Pursuant to General Order No. 514 as amended, unless otherwise ordered by the Court, counsel or parties shall be required to remove or redact personal information, including Social Security Numbers, from all pleadings (including exhibits) filed with the District Court, whether filed electronically or in paper. Pursuant to General Order No. 514-C, a party wishing to file a document containing personal data identifiers, such as Social Security Numbers, may file an unredacted document under seal. The "unredacted document shall be retained by the court as part of the record" and "the court may, however, still require the party to file a redacted copy for the public file."

Here, the Original Complaint includes exhibits containing the Social Security Numbers of Plaintiffs as well as the Social Security Numbers of other individuals. The language of the First Amended Complaint (including exhibits) has the same language as the Original Complaint (including exhibits) except that the Social Security Numbers in the exhibits attached to the First Amended Complaint have been redacted and replaced with the following language:

[REDACTED]. Granting Plaintiffs' request to file an Amended Complaint and to place the Original Complaint under Seal is necessary to for Plaintiffs to comply with General Order No. 514 as amended, the policy on privacy and public access to electronic case files of the Judicial Conference of the United States, and the E-Government Act of 2002.

Document 4-5

Filed 08/19/2008

Page 3 of 3

MEM. OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION TO FILE FIRST AMENDED COMPLAINT AND TO PLACE ORIGINAL COMPLAINT UNDER SEAL

Case 3:08-cv-01439-W-WMC

RICHARD V. VERMAZEN (State Bar #153029) Law Office of Richard V. Vermazen 2 1951 Cable Street San Diego, CA 92107 3 Telephone: (619) 523-8495 Fax: (619) 523-8575 4 LAUREN A. RINSKY (State Bar #240012) 5 Ernest S. Ryder & Associates, Inc., APLC 11440 West Bernardo Court, Suite 170 6 San Diego, CA 92127 Telephone: (858) 674-8000 7 Fax (858) 674-0788 8 Attorneys for Plaintiffs 9 10 11 UNITED STATES DISTRICT COURT 12 SOUTHERN DISTRICT OF CALIFORNIA 13 14 RICHARD D. EMMERSON Civil No. 08 CV 1439 W WMc AND M. HELEN EMMERSON, 15 DECLARATION OF RICHARD V. VERMAZEN IN SUPPORT OF Plaintiffs, 16 PLAINTIFFS' EX PARTE APPLICATION TO FILE FIRST AMENDED COMPLAINT VS. 17 WITH CONFIDENTIAL INFORMATION REDACTED AND TO PLACE ORIGINAL UNITED STATES OF AMERICA 18 COMPLAINT UNDER SEAL Defendant. 19 20 21 I, RICHARD V. VERMAZEN, declare as follows: 22 1. I am an attorney for Plaintiffs Richard D. Emmerson and M. Helen Emmerson in the 23 above-captioned matter. This declaration is filed in support of Plaintiffs' Ex Parte Application to 24 File First Amended Complaint with Confidential Information Redacted and to Place Original 25 Complaint under Seal. 26 2. Neither the Defendant United States of America nor Defendant's Counsel has been 27 contacted regarding this ex parte application because neither Plaintiffs nor Plaintiffs' Counsel not 28 DECLARATION OF RICHARD V. VERMAZEN IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION TO FILE FIRST AMENDED COMPLAINT AND TO

Civil No. 08 CV 1439 W WMc

PLACE ORIGINAL COMPLAINT UNDER SEAL

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Filed 08/19/2008

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DECLARATION OF RICHARD V. VERMAZEN IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION TO FILE FIRST AMENDED COMPLAINT AND TO PLACE ORIGINAL COMPLAINT UNDER SEAL 2

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